HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

C.R.No.2538 of 1990

Date of decision : 28.03.2007

State of Punjab **.....Petitioner**

versus

Harjit Singh **.....Respondent**

CORAM : HON'BLE MR. JUSTICE HEMANT GUPTA.

Present: Mr.Daldeep Singh, DAG, Punjab for the petitioner.
Mr.R.S.Chahal, Advocate for the respondent.

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ORDER

HEMANT GUPTA, J.

The challenge in the present revision petition is to the order passed by the learned District Judge, Amritsar dated 2.4.1990, whereby an appeal filed against the order passed by the learned trial Court dated 11.10.1989 dismissing the application for restoration of the suit, was dismissed as not maintainable.

The plaintiff-petitioner filed a suit for recovery of Rs.12,200.72 paise. It is the case of the plaintiff that 25 acres of land was purchased by the plaintiff for a total sale consideration of Rs.37,500/- which was paid by the plaintiff on 31.3.1960. On the basis of said payment, a sale deed dated 5.4.1960 was executed by the vendor and the possession was delivered to the plaintiff.

However, subsequently, it was found that Didar Singh, father of Harjit Singh, defendant has no right in 48 kanals of land. The said finding was returned vide judgment dated 16.9.1976. Thereafter the plaintiff filed the present suit for recovery of proportionate price to the

extent of share of Didar Singh. The said suit was dismissed in default on 10.6.1988.

An application for restoration of said suit was dismissed on account of failure of the plaintiff to lead evidence on 11.10.1989. The appeal against the said order was dismissed by the learned first Appellate Court on the ground that it is not maintainable.

Firstly, the question whether the appeal against the order dismissing the application for restoration of the suit is maintainable or not is not res-integra. The Hon'ble Division Bench of this Court in a case reported, ***"Bhajan Singh versus Ganeshi Devi, AIR 1978 Punjab and Haryana-257",*** has held that in terms of Section 141 of the Civil Procedure Code, the procedure provided in the Code has to be followed in respect of an application under Order 9 Rule 9 of the Code as well. While considering the provisions of Section 141 of the Code of Civil Procedure, it was held to the following effect:-

> "The provisions of the section are very wide in their amplitude and there is no reason why any restricted meaning should be attached to them in the absence of any indication to that effect in the language employed. An application under order IX, Rule 9 of the Code is certainly a proceeding in a Court of civil jurisdiction and, therefore, the procedure provided in the Code in regard to suits has to be followed in respect thereof. In other words, if an application of that type is dismissed for default, the procedure available to the aggrieved party would be the same as is open to a plaintiff when his suit is dismissed for default."

In view of the aforesaid principle, an application for restoration of the suit dismissed in default is appealable in terms of Order 43, Rule 1 (C) of the Civil Procedure Code.

On merits, the application dismissed by the learned trial Court was an application for restoration of the suit which was earlier dismissed in default on 10.6.1988. Since the application is for restoration of the suit for recovery of the amount paid by the plaintiff, it would be in the interest of justice if the suit is restored so that the parties are able to get decision on merits. The absence of the plaintiff cannot be said to be on account of any lack of bonafide, may be the plaintiff was not vigilant enough to prosecute the suit as may be required.

In view of the above, the present petition is allowed. The order dated 2.4.1990 passed by the learned District Judge is set-aside. The order dated 10.6.1988 dismissing the suit in default and order dated 11.10.1989 dismissing the application for restoration of the suit are also set-aside.

Parties through their counsel are directed to appearing before the learned trial Court on 30.4.2007 for further proceedings, in accordance with law.

(HEMANT GUPTA)
JUDGE

March 28, 2007
**mohinder*